No. — 285

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER,

v.

ISTHMIAN STEAMSHIP COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on May 6, 1958.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York, dated August 9, 1955 (R. 17a-21a) [1] is reported at 134 F. Supp. 854. The opinions of the Court of Appeals in this case (Appendix, *infra*, pp. 18-19) and in the related case of *Grace Line, Inc.* v. *United States* [2] (Appendix, *infra*, pp. 21-31) are not yet reported.

[1] "R." refers to the appendix to the Government's Court of Appeals' brief, filed in this Court pursuant to Rule 21(3).

[2] The opinion in the instant case incorporates by reference the reasons stated in *Grace Line, Inc.* v. *United States*. We do not seek review of the decision in the *Grace Line* case for the reasons noted *infra* (p. 6, note 3).

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1958 (Appendix, *infra*, p. 20). The time within which to file a petition for a writ of certiorari was extended to and including August 19, 1958 by order of Mr. Justice Harlan, dated July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Government's long-standing power under 31 U.S.C. 71 to effectuate administrative recoupment, *i.e.* to withhold funds which it admittedly owes a claimant and to apply them toward the satisfaction of an independent debt which the latter owes to the United States, is inoperative in the field of admiralty.

2. Whether a court, awarding interest in a case arising under the Suits in Admiralty Act, may make an award exceeding the 4 per centum statutory limit by allowing interest on the interest which accrued between the filing of the suit and the entry of the final decree.

STATUTES INVOLVED

1. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. 71, provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2. Section 3 of the Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 743, provides in pertinent part:

> * * * [W]hen the decree is for a money judgment [against the United States], interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. * * *

3. Section 5 of the Suits in Admiralty Act, 41 Stat. 526, as amended, 46 U.S.C. 745, provides in pertinent part:

> * * * [N]o interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest.

STATEMENT

1. *The facts:*

In 1946, the United States chartered eight vessels to the Isthmian Steamship Company ("Isthmian") on a bare boat basis (R. 5a-6a). The charter parties contained a clause providing that if Isthmian's net voyage profits should exceed 10 per centum per annum of the capital invested by the charterer, Isthmian would pay the United States a part of such excess as additional charter hire (R. 7a-8a). The United States determined that the additional charter hire due it under this clause, for the period from May 1, 1946 to July 31, 1948, amounted to $115,203.76 (R. 9a).

In 1953, Isthmian's vessel *S.S. Steelworker*—not one of the vessels involved in the 1946-1948 bare boat charters—carried certain military cargo for the United States. When Isthmian submitted a freight bill for $116,511.44 (R. 4a), the United States, on June 3, 1953, acting pursuant to 31 U.S.C. 71 (*supra*, p. 2), with-

held the sum of $115,203.76 from that bill, and applied it to the payment of Isthmian's indebtedness to the United States for additional charter hire (R. 9a).

2. *The litigation:*

a. In the Court of Claims. Isthmian first sued in the Court of Claims to recover the amount withheld. Its complaint alleged that it had carried cargo on the *S.S. Steelworker* for the Military Sea Transportation Service; that it had submitted a freight bill for its services in the amount of $116,511.44; that the United States did not deny that this sum was owing for transportation of the cargo; that, nevertheless, the Military Sea Transportation Service had drawn a check in the sum of $115,203.76 to the Maritime Administration to cover an alleged claim for additional charter hire, the validity of which Isthmian denied. The United States moved to dismiss the complaint on the ground that the subject matter of the controversy was either Isthmian's claim for maritime freight or the Government's claim for additional charter hire, and that in either event the district courts had exclusive jurisdiction under the Suits in Admiralty Act. The Court of Claims agreed and granted the motion. *Isthmian Steamship Co.* v. *United States,* 131 C. Cls. 472.

b. In the District Court. Shortly before the dismissal of its complaint in the Court of Claims, Isthmian filed a libel in the United States District Court for the Southern District of New York alleging that the United States owed Isthmian freight charges for certain cargo transported on the *S.S. Steelworker;* that Isthmian had presented a bill for $116,511.44; and that the United States had failed and refused to pay $115,203.76 due and payable under the bill of lading (R.

3a-4a). The libel made no reference to the fact that the Government had withheld the $115,203.76 in order to satisfy its claim in that amount for additional charter hire.

The answer of the United States (R. 5a-9a) admitted that Isthmian had submitted a claim for maritime freight for $116,511.44, denied that the Government had failed and refused to pay $115,203.76, and alleged that this sum had been paid by applying it to Isthmian's indebtedness to the United States for additional charter hire in the same amount. Shortly before answer, the Government had filed in the same court a cross-libel against Isthmian for the recovery of $115,203.76 additional charter hire. The day after the filing of its answer, the United States moved to consolidate Isthmian's libel with the Government's cross-libel on the ground that the question of the validity of the Government's claim for additional charter hire was fully dispositive of both libels (R. 10a-13a).

Isthmian excepted to the answer on the ground that the defensive matter pleaded therein did not arise from the transaction for which the libel was filed. It moved that the excepted matter be stricken from the answer and that Isthmian be given judgment on the pleadings (R. 14a-16a).

The District Court held that the defense of withholding and applying did not constitute a plea of payment, but that it constituted a claim of set-off arising from a discrete transaction. Holding further that admiralty had no jurisdiction over such a set-off, it struck the Government's defense and awarded judgment to Isthmian. The court also denied the motion to consolidate because, after the Government's defense had been

stricken, Isthmian's libel and the Government's cross-libel no longer had any common issue (R. 17a-23a).

The final decree awarded Isthmian the sum of $115,203.76, interest at 4 per centum per annum from the time of the filing of the complaint to the day of decree, amounting to $2,070.51, and $40 costs, totalling $117,314.27 It awarded further interest on that total, at the rate of 4 per centum, from the date of the decree until paid. The interest which accrued during the pendency of the litigation in the District Court ($2,070.51) is drawing interest at the rate of 4 per centum per annum; in other words, it has been compounded.

c. In the Court of Appeals. The Court of Appeals affirmed the decision of the District Court on the authority of its ruling in *Grace Line, Inc.* v. *United States,* decided on the same day (Appendix, *infra,* pp. 21-31).[3]

In *Grace Line,* the Court of Appeals held that the Government's defense of withholding and applying did not constitute a plea of payment but one of set-off or counterclaim. Such set-off, in its view, was not cognizable in admiralty because it did not arise from the transaction on which the libel was based.

Dealing with the Government's argument that its disputed claim for additional charter hire constituted the actual subject matter of the instant controversy,

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[3] We do not petition for a writ of certiorari in *Grace Line* because that decision rests on the additional ground that the statute of limitations of Section 3(6) of the Carriage of Goods by Sea Act and a limitations clause contained in the bill of lading had both run against the claim of the United States (Appendix, *infra,* pp. 24-27). While we believe that that ruling is not correct, it does not appear at the present time that the issue of limitations is of sufficient importance to warrant review by this Court. We have been advised by the General Accounting Office that it has devised procedures designed to insure the timely deduction of damage claims arising out of ocean transportation.

the court said that no "amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure" (Appendix, *infra*, p. 29). It concluded that the proper procedure in this type of litigation is to enter a decree *pro confesso* for the libelant. The Government, the court said, may then pursue a remedy under 31 U.S.C. 227, *i.e.*, the Comptroller General can withhold payment of the amount awarded by the decree and cause a new action to be instituted against libelant (Appendix, *infra*, pp. 27-28).

The Court of Appeals also held that Section 3 of the Suits in Admiralty Act, which provides that interest at the rate of not to exceed 4 per centum per annum may be awarded to "run as ordered by the court", authorized the District Court to exceed the 4 per centum rate by the compounding of interest (Appendix, *infra*, pp. 30-31).

REASONS FOR GRANTING THE WRIT

If Isthmian were a rail carrier, rather than a water carrier, and the circumstances were otherwise identical, it is plain, under this Court's decision of only last term in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, that (1) the act of the United States in withholding and applying funds admittedly due Isthmian for transportation services in order to satisfy a pre-existing claim of the United States would place upon Isthmian the burden of instituting suit, and (2) that the only issue in that suit would be the validity of the Government's disputed claim against Isthmian. The consequence of the decision below is that when the claimant is an ocean carrier

(though not otherwise) the availability of administrative recoupment is destroyed. Isthmian is thus held entitled to a decree *pro confesso* awarding the amount which the Government had withheld, albeit there has been no adjudication of the merits of the Government's withholding. The only matter which is actually in dispute is left untouched. And the court concludes that the remedy is for the Government to institute a new law suit.

We submit that the court below misconceived the real nature of the case before it; that admiralty procedures certainly do not require the meaningless circuity of action which this decision entails; and that there is no sound basis, either from the standpoint of substance or procedure, for excepting maritime claims from the operation of the Government's established power to withhold and apply.

To the extent that the decision below approves a departure from the statutory 4 per centum limit on the rate of interest which may be awarded in cases arising under the Suits in Admiralty Act, it disregards the settled rule that statutes authorizing the award of interest against the United States are to be narrowly construed and that they are deemed to refer to simple interest only.

1. The Court of Appeals erred in failing to recognize, *first*, that the Government's defense of withholding and applying is in the nature of a plea of payment, which is, of course, within the jurisdiction of the admiralty courts; and *second*, that in an action or libel designed to challenge the exercise by the Government of its power to withhold and apply, the Government's disputed claim is the real subject matter of the litigation.

a. *The legal import of the Government's defense was payment, not set-off.* Section 305 of the Budget and Accounting Act, 1921, 31 U. S. C. 71, *supra*, p. 2, which dates back to the Act of March 3, 1817, 3 Stat. 366, and to R. S. 236, provides that all claims and demands by or against the Government shall be settled and adjusted in the General Accounting Office. It has been established for nearly a century that this power to "settle and adjust" includes the authority, if not the duty, "to set off one debt against another, when a claimant is both debtor and creditor" *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U.S. 179, 186. The effect of the exercise by the Government of its power under 31 U. S. C. 71 is "to strike a balance between the debts and credits of the government." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240. In short, where the United States withholds payment on a debt owed by it and applies it to a valid claim of its own, the indebtedness of the claimant to the United States is discharged, and, conversely, the substance of his claim against the United States is destroyed. *McKnight* v. *United States*, 98 U.S. 179; *United States* v. *American Surety Co.*, 158 F. 2d 12, 13 (C.A. 5); *Sanders* v. *Commissioner of Internal Revenue*, 225 F. 2d 629, 637 (C.A. 10), certiorari denied, 350 U.S. 967; *American Railway Express Co.* v. *United States*, 62 C. Cls. 615, 636, certiorari denied, 273 U.S. 750; *Morgan* v. *United States*, 131 F. Supp. 783 (S.D. N.Y.).

The defense of withholding and applying thus is in the nature of a plea of payment.[4] Concretely, in this

[4] On the historic relationship between the pleas of defense and set-off, see Waterman, *A Treatise on the Law of Set-Off, Recoupment, and Counterclaim* (1869), Section 560.

case it explains the Government's denial of the allegation in the complaint that the United States had failed and refused to pay the $115,203.76 in dispute (*supra*, p. 5).

b. *In an action seeking judicial review of the Government's act of recoupment, the validity of the Government's contested claim, not the plaintiff's uncontested claim, is the real subject matter of the litigation.* To be sure, the debt owed by the Government is not discharged by the mere *ipse dixit* of the Comptroller General that the claimant, himself, is indebted to the United States. The courts have full power to review the Comptroller's action and to determine whether the Government had a valid claim, for only in that event has the Government's indebtedness been discharged, *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240.

The true import of respondent's complaint is that the Government improperly withheld payment because it does not in fact have a valid claim for additional charter hire. The essential nature of the action cannot be concealed by the fact that respondent limited itself to a recital of its claim for maritime freight and omitted all reference to the Government's withholding action (which, significantly, had been detailed in respondent's prior complaint in the Court of Claims).[5]

[5] These considerations, of course, are not limited to the Government's plea of withholding and applying. It is generally recognized that where the defendant admits all the basic allegations of the complaint and sets up an affirmative defense, the issue which emanates from the answer is the subject matter of the litigation, and that a litigant may not curtail his opponent's defense by artfully framing his complaint so as to make *bona fide* defenses going directly to the heart of the controversy assume the appearance of a set-off or counterclaim unrelated to the subject matter of the action. *Eastern Transportation Co.* v. *Blue Ridge Coal Corp.*; 159 F. 2d 642, 643 (C.A. 2); *United States* v. *West*, 8 App. D. C. 59, 64; *Parmelee*

In holding contrariwise that it was bound by the formal allegations of the complaint, the court below disregarded the teaching of this Court in *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, 263, which held that in actions of this type the courts are concerned with substance, not form, and that, although the complaint may set forth only the claimant's uncontested claim, the true dispute between the parties—the lawfulness of the claim on which the withholding is based—must be determined. To the same effect, see *Alcoa S. S. Co.* v. *United States*, 338 U.S. 421, 422, and *Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, 327, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U.S. 1.[6]

2. Even if we assume *arguendo* that the Government's defense constituted a set-off or counterclaim not arising from the same transaction upon which the libel was based, the court below had jurisdiction to entertain the defense. Giving no weight to the consideration that unlimited set-off is permitted under the Federal Rules of Civil Procedure, the court below declares that limiting the assertion of set-offs in admiralty "has stood the test of time" (Appendix *infra*, p. 29). Its approach is in striking contrast to this Court's recent

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v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 586 (C.A. 8); *Lesnik* v. *Public Industrial Corporation*, 144 F. 2d 968, 975 (C.A. 2); *Cleveland Engineering Co.* v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407 (N.D. Ohio).

[6] Similarly, where the United States withholds payments of a pension on the basis of Government claims against the pensioner, the courts have had no difficulty in reviewing the propriety of the withholding, i.e., in examining the validity of the Government's claim, despite the fact that they lack jurisdiction over pension claims. 28 U. S. C. 1346(d), 1501. *Reynolds* v. *United States*, 292 U.S. 443; *Price* v. *United States*, 121 C. Cls. 664, certiorari denied, 344 U.S. 911; cf. *McElhany* v. *United States*, 101 C. Cls. 286, 291-292.

admonition that "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices," *British Transport Commission* v. *United States*, 354 U.S. 129, 139.[7]

The decisions limiting set-offs and counterclaims in admiralty to those arising from the same transaction which constitutes the subject matter of the libel rely primarily on three considerations, none of which has vitality. First, there is the policy of protecting seamen's wage claims against set-off.[8] This has been achieved by statute ever since 1872.[9] Second, there is the desire to prevent a complicated trial from becoming utterly unmanageable by the injection of extraneous issues.[10] This may be accomplished by ordering separate trials in appropriate cases, as is commonly done under Rule 42(b), Federal Rules of Civil Procedure.[11] Third, some cases, notably *United Transportation & L. Co.* v. *New York & Baltimore Tr. Line*, 185 Fed. 386 (C.A. 2), rest upon a very restricted view of the scope of admiralty jurisdiction. This view has never been shared by this Court (*Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U.S. 117; *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684; *Archawski* v. *Hanioti*, 350 U.S. 532), and the Second

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[7] See, also, *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 216, "It [admiralty] looks to a complete and just disposition of a many cornered controversy. * * *"

[8] See, *e.g.*, *Willard* v. *Dorr*, 3 Mason 161, 171-172, 29 Fed. Cas. 1277, 1280, No. 17680 (C.C.D. Mass.); *Bains* v. *The James & Catherine*, Baldw., 544, 2 Fed. Cas. 410, No. 756 (C.C.D. Pa.).

[9] Cf. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 781.

[10] Cf. *Powell* v. *United States*, 300 U.S. 276, 289-290.

[11] This consideration, of course, is not applicable where, as here, the claim upon which the libel is based is undisputed and the sole controversy centers on the justification of the withholding.

Circuit itself seemed to have abandoned it. *Sword Line* v. *United States*, 230 F. 2d 75, affirmed, *per curiam*, 351 U.S. 976.

The early cases limiting set-off in admiralty also took the position that in this, as in many other aspects, admiralty followed equity.[12] Equity, however, has permitted independent set-offs and counterclaims since (if not before) the promulgation of the Equity Rules of 1912. Rule 30, 226 U.S. 657.[13] Reassertion in this case of the view that set-off in admiralty is subject to rigorous restrictions is an anachronism.

Moreover, it is peculiarly inappropriate to apply such restrictions here. Prior to the enactment in 1920 of the Suits in Admiralty Act, the Court of Claims and (in cases involving less than $10,000) the district courts had jurisdiction over claims arising under maritime contracts like the one at bar. In such proceedings, the United States had unlimited power of set-off under the equivalents of the present 28 U. S. C. 1346(c) and 1503. It is hardly to be assumed that when the Suits in Admiralty Act transferred most maritime claims against the United States to the exclusive jurisdiction of the admiralty courts,[14] Congress sought to curtail the Government's power to withhold and apply.[15]

3. In holding that respondent was entitled to interest

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[12] Cf. *The Dove*, 91 U.S. 381, 385; *Willard* v. *Dorr*, 3 Mason 161, 171-172, 29 Fed. Cas. 1277, 1280, No. 17680 (C.C.D. Mass.); *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 116 Fed. 857, 858 (C.A. 1).

[13] The scope of Equity Rule 30 has been clarified and somewhat expanded by Rule 13, Federal Rules of Civil Procedure. See 3 Moore, *Federal Practice* (Second Edition), Section 13.03.

[14] *Johnson* v. *Emergency Fleet Corp.*, 280 U.S. 320.

[15] The mere fact that the Suits in Admiralty Act does not contain an express equivalent to 28 U. S. C. 1346(c) and 1503 certainly does not foreclose the right of set-off. The Government's power to with-

on the interest which accrued while the case was pending in the District Court, the decision below not only makes an award in excess of the 4 per centum statutory limit, but conflicts with consistent rulings that compound interest may not be awarded against the United States in the absence of specific statutory authorization. Immunity from payment of interest (except in just compensation cases) is an incident of the sovereignty of the United States which can be waived only by Congress. *United States* v. *N. Y. Rayon Co.*, 329 U.S. 654, 660-661; *United States* v. *Goltra*, 312 U.S. 203, 207.[15a] The pertinent statutory provisions (Sections 3 and 5 of the Suits in Admiralty Act, *supra*, pp. 2-3) authorize the award of "interest at the rate of 4 per centum per annum until satisfied" and at no higher rate unless permitted by contract. They also provide that "[i]nterest shall run as ordered by the court" but not from a time prior to the filing of the libel. The court below apparently took the position that the latter clause authorized the District Court to compound interest. The compounding of interest, however, is never favored, not even where private persons are con-

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hold and apply does not flow from procedural provisions such as 28 U. S. C. 1346(c) and 1503, permitting set-off, but from 31 U. S. C. 71, which is of a substantive nature. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240; *Eastern Transportation Co.* v. *United States*, 159 F. 2d 349, 352 (C.A. 2); *Malman* v. *United States*, 207 F. 2d 597 (C.A. 2). Admiralty can fashion the procedural means for enforcing any substantive law it has been called upon to administer. *The Epsilon*, 6 Ben. 378, 389, 8 Fed. Cas. 744, 748, No. 4506 (E.D. N.Y.); *The Hudson*, 15 Fed. 162 (S.D. N.Y.); *Dowling* v. *Isthmian Steamship Corp.*, 184 F. 2d 758, 778 (C.A. 3). And it may not prescribe a rule abridging or modifying a substantive right created by Congress. 28 U.S.C. 2073. Cf. Appendix, *infra*, p. 28.

[15a] Congress has not ordinarily allowed prejudgment interest at all (see 28 U.S.C. 2411, 2516; 31 U.S.C., Supp. V, 724a; 46 U.S.C. 782), no less compound interest.

cerned.[16] Consequently, it has been held consistently that statutes authorizing the award of interest against the United States refer to simple interest only and do not warrant compound interest. *Cherokee Nation* v. *United States*, 270 U.S. 476, 490-491; *Ute Indians* v. *United States*, 45 C. Cls. 440, 470; *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 162.[17]

4. We believe that both questions raised by this petition are of substantial importance.

Certainly the question whether the Government's traditional power to withhold and apply is inoperative in the field of admiralty is one of practical importance in the day-to-day operations of the Government. The decision below cannot fail to have serious impact upon the Government's methods of paying its bills and collecting overcharges. The business transactions of the United States with shipping companies are, of course, numerous and substantial in volume. In some forty cases now pending in the admiralty courts, the United States has interposed a defense based upon an act of withholding and applying. This takes no account of the controversies, greater in number, in which the Government has exercised its right of administrative recoupment but in which suit has not yet been brought.

The matter is of moment from the standpoint of sound judicial administration as well as from the standpoint of litigants. The necessary consequence of the

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[16] *Cherokee Nation* v. *United States*, 270 U.S. 476, 490; *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (C.A. 2), certiorari denied, 332 U.S. 836.

[17] *National Bulk Carriers* v. *United States*, 169 F. 2d 943, 951 (C.A. 3), cited in the opinion below, deals with interest as an element of just compensation for the taking of property, a situation in which specific statutory authority for the award of interest is not deemed required. See *Jacobs* v. *United States*, 290 U.S. 13, 16.

decision below is circuity of action and a multiplication of law suits. The adjustment of competing demands in a single suit is generally favored and encouraged.[18] It ought to be particularly encouraged where, as here, there is actually only one claim which is controversial.

The question whether interest which accrued during the pendency of litigation in the district court may itself draw interest from the time of the final decree is likewise of broad importance. It is not limited to cases in which the Government has exercised its power to withhold and apply, but presents itself whenever a money judgment is entered against the United States in an admiralty court.

While in the average case the amount involved may not be large, the cumulative effect of the compounding of interest will result in the imposition of a substantial burden. The instant case and the *Grace Line* case are not the only instances in which compound interest has been awarded. The practice is now being followed in almost every case decided in the Southern District of New York where a very large percentage of the Government's admiralty litigation is concentrated.

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[18] See *Barry* v. *United States*, 229 U.S. 47, 53; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U.S. 596, 615-616; *Cherry Cotton Mills, Inc.* v. *United States*, 103 C. Cls. 243, 251, affirmed, 327 U.S. 536; *Pamelee* v. *Chicago Eye Shield Co.*, 157 F. 2d 582, 587-588 (C.A. 8); *Thompson* v. *United States*, 250 F. 2d 43 (C.A. 4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
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Attorneys.

AUGUST 1958.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 4—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24415

ISTHMIAN STEAMSHIP COMPANY, LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges*

Appeal from a decree of the United States District Court for the Southern District of New York, in admiralty. Edward J. Dimock, *Judge*. Opinion below not reported. Affirmed.

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Clement C. Rinehart and Walter P. Hickey, New York, N. Y., of Counsel), *for libelant-appellee.*

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C.; Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant.*

MEDINA, *Circuit Judge*:

This appeal involves the same questions as were considered in *Grace Line, Inc.* v. *United States*, our opinion

in which case is filed herewith. In 1946 Isthmian Steamship Company, appellee, used eight vessels chartered to it on a bareboat basis by the United States through the War Shipping Administration. As a result of Isthmian's use of these vessels for the period from May 1, 1946 to July 31, 1948, the United States claimed $115,203.76 as additional charter hire, which Isthmian refused to pay. When, after carrying certain cargo for the United States in 1953, Isthmian submitted a bill for $116,511.44, the United States withheld the amount allegedly due as additional charter hire. Isthmian thereupon filed the libel below to recover its freight for the 1953 shipments.

Isthmian's libel did not refer to its alleged indebtedness to the United States arising out of the 1946-1948 chartering of the vessels. The government's answer alleged that Isthmian was indebted to the United States because of the earlier transaction between the parties, but Isthmian's exception to this answer was sustained on the ground that the admiralty court had no jurisdiction over the set-off not related to the subject of the libel, and a decree *pro confesso* followed.

For the reasons stated in our opinion in *Grace Line, Inc.* v. *United States*, the decree of the court below is

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in the result. See my separate concurring opinion in *Grace Line, Inc.* v. *United States.*

Involved in this case is an added issue relative to the jurisdiction of the court below because of a possible time bar period. Lest it be thought that this issue was not considered by us, I would add that the pleadings disclose that the district court and this court have jurisdiction.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May one thousand nine hundred and fifty-eight

Present: HON. THOMAS W. SWAN, HON. HAROLD R. MEDINA, HON. STERRY R. WATERMAN, *Circuit Judges*

ISTHMIAN STEAMSHIP COMPANY, LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee,

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 5—October Term, 1957.

(Argued November 6, 1957 Decided May 6, 1958.)

Docket No. 24416

GRACE LINE, INC., LIBELANT-APPELLEE,

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges*.

The United States appeals from a decree of the United States District Court for the Southern District of New York, in admiralty. William B. Herlands, *Judge*. Opinion below reported at 144 F. Supp. 548. Affirmed.

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Walter P. Hickey, L. DeGrove Potter and Clement C. Rinehart, New York, N. Y., of Counsel), *for libelant-appellee*.

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C., Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant*.

MEDINA, *Circuit Judge*:

In form the decree in admiralty from which the government appeals was entered *pro confesso* on motion of the libelant Grace Line, Inc., based upon exceptions and exceptive allegations addressed to the sufficiency of the answer, which asserted payment of the claim sued upon.

It is alleged in the libel that between December 31, 1954 and February 16, 1955 Grace carried six shipments of ore for the United States for which freight charges in the amount of $10,732.22 became due and payable. The validity of this freight claim is not disputed. But the United States paid only $2,490.75, and the remaining $8,241.47, for which the judgment *pro confesso* was entered, was withheld and applied by the Comptroller General against the freight bill because of damages alleged to have been suffered by the United States in a wholly unrelated series of transactions, during the period from December 14, 1952 to April 6, 1953, in connection with which it is claimed that some of the goods transported by Grace were delivered in a damaged condition and some were lost.

The bills of lading under which the 1952-1953 shipments were made provided that "the Carrier shall be discharged from all liability in respect of * * * every claim whatsoever with respect to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *." The bills also incorporated by reference the Carriage of Goods by Sea Act, 46 U. S. C. § 1301 *et seq.*, which includes a similar one year time bar. No judicial proceedings were instituted by the United States against Grace for the loss of, or damage to, the 1952-1953 shipments within the one year period.

Grace's libel in the court below claimed that freight was due under the 1954-1955 shipments, but made no mention of Grace's earlier transactions with the United

States. The government's answer alleged, by way of set-off or defense, that Grace was indebted to the United States in an amount greater than that claimed in the libel because of its mishandling of the earlier shipments. Grace's exceptions to the sufficiency of this answer were sustained on the grounds: (1) that the government's claim based on the 1952-1953 shipments arose from a transaction unrelated to the libel and thus could not be made the subject of a set-off in an admiralty proceeding; and also (2) that this earlier claim was time-barred.

On this appeal the government urges several grounds for reversal. Its first contention is that the Comptroller General's withholding and applying of funds due a creditor because of the creditor's alleged indebtedness to the United States results in the discharge of "mutual debts" and thus constitutes "payment"; and that an admiralty court must always consider payment as a defense to a libel. The government bases this argument on the provision in 31 U. S. C. § 71 that all claims by or against the United States "shall be settled and adjusted in the General Accounting Office," which it asserts is part of a "comprehensive statutory plan" made up of this and several other statutes, located in different parts of the United States Code,[1] authorizing the withholding of money by the Comptroller General whenever a creditor of the United States is also allegedly indebted to the United States.

The specific issue on this first phase of the case is: what did the Congress mean by 31 U. S. C. §71, which provides: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor,

[1] 5 U. S. C. §46(d) (Supp. III); 5 U. S. C. § 82; 31 U. S. C. § 227; 49 U. S. C. § 66.

shall be settled and adjusted in the General Accounting Office." The question is one of statutory interpretation. We think it merely pricks the surface of the problem to dispose of the case by saying that it is absurd to suppose that the statute was intended to provide the government with a means of keeping stale claims alive indefinitely with respect to those having more or less continuous business relations with the United States.

The semantics of the government approach here is in terms of the defense of "payment." But the underlying thesis must be that the Congress intended to bypass the process of adjudication and provided in lieu thereof a unilateral decision by the Comptroller General. We can find nothing in the statute to warrant any such inference. It is not provided that the withholding shall constitute payment or a discharge of the debt, nor does the general context, nor any word or phrase therein, indicate that the normal processes of adjudication are to be overridden. Indeed, there is no dispute about the right of the government to proceed, as it often does, to reduce its claim to judgment if it can. Moreover, in the view of the Comptroller General,[2] and under the cases,[3] the withholding by the Comptroller General is subject to judical review; and no legislative history has been brought to our attention which supports the contention that administrative action by the Comptroller General in withholding money

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[2] Letter of the Comptroller General of the United States, 1954 U. S. Code Congressional and Administrative News, 2553, 2554.

[3] E.g., *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 240. In *Munsey*, where the Supreme Court said that "(t)he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due him,'" 332 U.S. at 239, it was considering the situation where the creditor's debt to the United States was not disputed, and it clearly recognized that such was the fact in the case then before it. 332 U.S. at 237, 240.

due to a creditor of the United States makes it unnecessary for the government to prove its claim on the merits, subject to such defenses as may exist in law or in fact, if it is to be applied against a claim of the creditor in settlement thereof. In other words, the attempted set-off must be a legally enforceable claim; and the fact that the Comptroller General has decided the claim in favor of the government *ex parte* by withholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the applicable Statute of Limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. Here the period of limitations had plainly run.[4]

The statutory scheme, such as it is, constitutes no more than a method for co-ordinating the claims and debts of the various government departments and agencies.

The government cites Section 322 of the Transportation Act of 1940, 49 U. S. C. §66, and its application in *United States* v. *Western Pac. R. Co.*, 352 U. S. 59, recently decided by the Supreme Court, as part of the "comprehensive statutory plan" which, it argues, shows that Congress intended that unilateral withholding and applying by the Comptroller General was to constitute payment of a creditor's claim. Consideration of the *Western Pacific* case and 49 U. S. C. §66 as applied therein, however, lends further support to our view, as expressed above, of the extent and effect of the Comptroller General's power to withhold and apply. In that case three railroads had carried shipments of bomb casings filled with napalm gel, which is inflam-

[4] *United States* v. *Seaboard Air Line Ry. Co.*, 4 Cir., 22 F. 2d 113. Compare 31 U. S. C. § 71, with 49 U. S. C. § 66.

mable but not self-igniting, for the United States. The railroads billed the United States at the highest, first-class, rates for "incendiary bombs" and the government paid the bills of two of the railroads as presented. On post-audit, however, the General Accounting Office made deductions from subsequent bills of these two railroads on the grounds that the shipments of napalm gel should have been carried at the lower, fifth-class, rate. The General Accounting Office had acted pursuant to 49 U. S. C. §66 which provides: "Payment for transportation of * * * property for on or behalf of the United States by any common carrier subject to the Interstate Commerce Act * * * shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." The railroads sued in the Court of Claims to recover the sums withheld from their subsequent bills and the government's defense rested on three contentions which went to the merits of the carriers' claim for payment of their subsequent bills. There was no contention that those bills had been "paid" by the withholding.

The statute on which the government relied in *Western Pacific* expressly reserved the right to the United States to deduct any overpayment from any subsequent bills, and this additional time was given to the government solely because the General Accounting Office was required to pay the carrier's bills "upon presentation * * *, prior to audit or settlement * * *." Of course, if the Comptroller General already had the power, under the previously enacted 31 U. S. C. §71 and other statutes authorizing the withholding of money, to "pay" creditor's claims by merely unilater-

ally applying amounts allegedly due the United States, regardless of the nature of, or time limitation on, the goverment's claim, there would be no need for the express reservation in the statute of the right to off-set claims of the United States against carriers' subsequent bills.

Thus it is abundantly clear to us, and we so hold, that the unilateral withholding and applying of money allegedly due the United States on a disputed claim against a creditor does not constitute payment of that creditor's claim against the United States.[5]

Had we agreed with appellant's view that the period of limitations had not run against the government damage claim one might suppose, from the arguments advanced in appellant's brief, that it might be a hardship for the government to pay the Grace claim only to sue for the recovery of the same funds or a part thereof in an action against Grace on the damage claim. But the applicable procedure is clearly set forth in 31 U. S. C. §227. Where a claim, such as the Grace claim for freight charges, is undisputed, the government may let the case proceed to judgment, after which Section 227 in terms provides that "it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt" due to the United States. In the event that the claimant does not acquiesce in the withholding but denies his indebtedness to the United States, Section 227 continues, "then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in procecuting the debt of the United States to final judgment." and "if such debt is not already in suit, it shall be the

[5] See also, *Climatic Rainwear, Inc. v. United States*, 115 Ct. Cl. 520.

duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch."

Appellant also attacks the ruling of Judge Herlands to the effect that appellant's damage claim was unrelated to the claim for the unpaid balance of freight charges alleged in the libel and hence was not within the admiralty jurisdiction, which only extends to set-offs arising out of the same transaction as that on which the libel is based. But this is the well settled admiralty practice, as Supreme Court Admiralty Rule 50 and the Southern and Eastern District Court Admiralty Rules 16 and 17 implicitly require that the set-off arise out of the same transaction. We have repeatedly so held, and as recently as 1951. *Ozanic* v. *United States,* 188 F. 2d 228; *Castner, Curran & Bullitt, Inc.* v *United States,* 5 F. 2d 214; *United Transp. & Lighterage Co.* v. *New York & Baltimore Transp. Line,* 185 Fed. 386.

The first point made by appellant on this phase of the case need not long detain us. The substance of this point is that the real controversy between the parties was the damage claim which we have already determined was time barred, and that Grace has limited the government's assertion of this claim "by artificial methods of framing (its) * * * libel." In other words, although Grace has not received the balance due for its freight charges, and asserts in its libel only its claim for the payment of this balance, appellant argues that there is really no dispute about the validity of the claim for freight charges, that this is a purely fictitious issue and that the claim is made in admiralty to foreclose the assertion by appellant of its unrelated damage claim. But there is nothing in this, nor do the cases relied on by appellant so hold. In each of these cases the state

of the pleadings was such that the issues litigated and decided were properly before the court. *Kreitmeyer* v. *Baldwin Drainage District*, 2 F. Supp. 208, 210 (S. D. Fla.), aff'd *sub nom. Florida Nat'd Bank of Jacksonville* v. *Hemphill*, 5 Cir., 68 F. 2d 785; *Eastern Transportation Co.* v. *Blue Ridge Coal Co.*, 2 Cir., 159 F. 2d 642; *Alcoa Steamship* v. *United States*, 80 F. Supp. 158, rev'd, 2 Cir., 175 F. 2d 661, aff'd, 338 U. S. 421.

In the case at bar the subject-matter of the libel was the alleged debt of the United States to Grace arising out of the 1954-1955 shipments, and there is no relationship whatever between this claim asserted in the libel and the claim asserted by the government. No amount of pleading can alter the fact that in this case there is no affirmative defense raised by the government, but rather an attempt to interpose a set-off which is barred by established admiralty procedure.

Appellant's other points are equally unpersuasive. It is idle to cite the numerous general statements in the authorities to the effect that admiralty practice is "non-technical, flexible and plastic," and to emphasize the liberality of the Federal Rules of Civil Procedure and the modern tendency to discard procedural impediments to the administration of justice in the courts. There must be rules to govern such matters as joinder of parties and claims, set-offs, counterclaims and third party practice; and here we have a rule which has stood the test of time and has been applied again and again. We are not at liberty to disregard or overrule it.

Appellant also contends, in this connection, that, even if the admiralty rules prevent the pleading of unrelated set-offs, such a procedural limitation is overcome by the statutory plan which gives the General Accounting Office the "substantive right" to withhold and apply money due a creditor. This argument that the admiralty procedural rule deprives the government of a sub-

stantive right is untenable. The substantive right of the government in the case at bar is its claim for damages resulting from Grace's alleged mishandling of the 1952-1953 shipments. The admiralty rule respecting set-offs is merely part of a congeries of procedural provisions, including the statutes establishing the government's right to withhold and apply, which do not affect the substantive rights of the parties in the case at bar.

Appellant also argues that, even if the strict admiralty rule respecting set-offs is to be applied in this case, the 1952-1953 and 1954-1955 shipments were "merely fragments of a single vast overall transaction" between Grace and the United States. However, the only connection between the shipments during the two separate periods is that both were undertaken by the same shipper, Grace, and, in our view, this alone cannot bring the dealings within the concept of a single transaction. Thus we hold that the court below correctly sustained Grace's exception to the government's pleading of its unrelated set-off.

The final point with which we must deal is the trial court's award of interest at 4% per annum from the date of the decree until the decree is paid, on the composite amount of the sum sought in the libel plus interest at 4% per annum on this amount from the date of filing the libel until the date of the decree. Appellant argues that the court below lacked the power to award this "compound interest." However, Section 3 of the Suits in Admiralty Act, 46 U. S. C. § 743 provides that " * * * when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied * * * " may be included in the decree against the United States, and that " (i)nterest shall run as ordered by the court * * * " There is no showing that the discretion vested in the trial court was abused by the decree

in the case at bar. See *National Bulk Carriers* v. *United States*, 3 Cir., 169 F. 2d 943, 951.

Affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur with the majority in affirming the judgment of the District Court. I disagree with my colleagues, however, in their characterization of the Government's position with respect to the defense of "payment." I do not understand the Government to argue that the "withholding and applying" procedure which it contends is authorized by 31 U. S. C. § 71 "makes it unnecessary for the Government to prove its claim on the merits * * * " I understand the Government's position to be that the merits of its claim may be adjudicated by a court of competent jurisdiction in an action brought by Grace Line to recover for the alleged wrongful withholding and that the Government does not intend to "by-pass the process of adjudication." Consistent with the position I understand the Government to have taken here, I note that in the case of *Isbrandtsen Company, Inc.* v. *United States*, the United States does not deny that the validity of its claim against Isbrandtsen is raised by Isbrandtsen's libel to recover amounts the Government had withheld and applied upon the claim.

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